In the
SUPREME COURT OF THE UNITED STATES

October Term, 1948
No. 173

HARVEY DEWATERS,
Petitioner,

v.

MACKLIN COMPANY, a Michigan Corporation,
Respondent.

On Petition For a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 50-60) are reported in 69 F. Supp. 262. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 204-213) is reported in 167 F. (2d) 694.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered April 26, 1948. A copy of the petition

tor certiorari was served on Respondent's counsel on July 22, 1948. Petitioner avers that he invokes jurisdiction of this Court "under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925" (Petition, p. 2).

QUESTION INVOLVED

Petitioner's statement of the question presented is inaccurate because it assumes the facts to be otherwise than as found by both lower Courts. The question actually involved, and on which the Court below passed, can be stated as follows:

Was there a violation of Section 7 (a) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U. S. C. 201-219) where, pursuant to explicit provisions of employment contracts, each employee received a specified hourly rate with time and a half for overtime, and in addition received (in those months when the total wages and overtime payments were less than a stipulated percentage of the employer's sales income allocable to that month's production) an additional payment which was arrived at by adding to the total earnings of each employee—both straight time and overtime, exclusive of the bonus—a predetermined percentge computed in accordance with a fixed formula, which resulted in each employee receiving one and one-half times as much compensation for each overtime hour as for each straight-time hour worked?

STATEMENT OF THE CASE

The statement of facts in the petition for certiorari is fragmentary, argumentative, contrary to the concurrent findings of both lower Courts, and, in our opinion, misleading.

III.

1. Petitioner's Contract of Employment

In final analysis, the case turns almost wholly on a simple question of fact: what was the employment contract of Petitioner? In an effort to bring the case within the doctrines previously laid down by this Court in such cases as *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427 (1945) and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945), counsel for Petitioner asserted in the District Court (R. 42), and argued again in the Circuit Court of Appeals (see R. 208, 167 F (2d), 697), and now repeats in his petition for certiorari (p. 6) that Petitioner was paid on a group piece-work basis; and that his total weekly piece-work earnings must be divided by the number of hours worked during the week to determine his regular rate of pay.

However, this factual assertion has been rejected by both lower Courts. The District Court found specifically that Petitioner and all other hourly rated employees except guards were hired at "fixed hourly rates" (R 52). The Circuit Court of Appeals held: "the employees were not piece-rate workers and were not employed on a piece rate basis;" and declared: "we do not agree with appellant's contention that the addition of the incentive pay plan turned the contract into one on a piece-rate basis" (R 209, 167 F (2d), 697). Petitioner's statement disregards these findings, and asserts the fact to be that his contract of employment was on a piece-rate basis. His statements are contrary to the concurrent findings of both lower Courts on this factual question and are therefore not entitled to consideration here. [1]

[1] Typical instances, which we think illustrate the character of the application in this respect, include the following:

In attempting to make it appear that piece-rate payments were involved, it is said on page 4 of the petition that the "effect of this plan has been to fix the employer's wage costs at a predetermined amount

IV.

If the concurrent findings of both lower Courts on this question of fact are accepted (in accordance with the usual principles and, indeed, in accordance with evidence found uncontradicted by the Circuit Court—R. 209), the case presents no question that has not been previously determined in conformity with the results reached by the lower Courts here. Long standing administrative interpretations, reaffirmed by decisions of the Courts, fully support the conclusion of the Lower Courts in the instant case that (adopting the language of the Wage and Hour Division in Release A-13) no additional overtime compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earnings of the individual employee (both straight time and overtime)[2] exclusive of

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for each unit of production", and similarly it is said on page 5 that "for each silicate carbon wheel produced, appellee pays in wages $0.936." These statements are not correct. The hourly wages paid employees for the production of certain items which were difficult to make would be substantially in excess of 24% of the sales price of such items. On other items, the wage cost per unit was substantially less than 24% of the sales price. The wage costs of producing silicate carbon wheels did not remain constant, but would vary each week, with variations in (a) the hours required to produce each wheel, (b) the amount of overtime worked in the pay period, (c) the bonus percentage paid with respect to that pay period. The only significance of 24% of the list price of any particular item was as one of the components in the computation of the amount of the bonus which was paid in *addition* to wages.

In furtherance of the same purpose, the payment of the hourly wages is described at page 5 of the petition as "wage advances", with the indication that it was merely a partial payment. But so to characterize the wage payments is to overrule the concurrent findings of fact of both lower Courts, and to repudiate the testimony of petitioner's own witnesses, who testified that their employment contract was for the paymen of hourly rates, not for the payment of piece rates. (R. 161, 162, 167, 158, 84).

The statement on p. 19 of the petition that payments made under Respondent's bonus plan were based solely on the employees' production cannot, we think, be reconciled with the findings of both lower Courts that the amounts payable were dependent upon the successful operation of the plant as a whole, reflecting such matters as efficiency of manufacturing processes (which were constantly being improved), the maintenance of a high volume of sales, efficient departmental planning, and the like.

[2] While we submit that even if the employment contract were for payment of piece rates, there would have been no violation of the Act, we suggest that this point need not be reached.

the bonus. In the instant case, the lower Courts merely applied this rule.

The employment contract of Petitioner[3] was as follows: he was hired eleven years prior to the date of the trial (R. 79) or in 1935. No bonus plan was in effect at the time he was hired, and during the first three years of his employment his total earnings were measured by his straight time hourly rate, which was increased from time to time. At all times since October, 1938, he received, in addition to his straight hourly rates, time and one-half for overtime; and, subsequent to the adoption of the income sharing plan here involved, he received in addition to his hourly rates and overtime (in months when the Company's sales income reached specified levels) a bonus which was computed by multiplying his gross earnings for the month (both straight time and overtime) by a percentage arrived at in accordance with a predetermined formula. Thus, for each straight time hour worked he received an hourly rate plus a bonus increment, and for each overtime hour worked he received one and one-half times his hourly rate plus one and one-half times the bonus increment. He received one and one-half times as much total compensation for each overtime hour as for each straight time hour. If, for example, the bonus percent was 20%, he received (during the period since 1942 when his hourly rate was 90c) $1.08 (90c plus 20% or 18c) for each straight time hour, and $1.62 ($1.35 plus 20% or 27c) for each overtime hour.

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[3] We do not agree that the decision here will control as to the remaining Plaintiffs, as stated in the Petition, for reasons that are not material here but among which are: (a) Respondent offered no evidence in the trial below, Plaintiff's case having been dismissed at the conclusion of Plaintiff's proofs; (b) the Portal-to-Portal Act having been enacted since the case was tried, additional defenses are available.

2. Respondent's Income Sharing Plan

Petitioner seeks in this action to penalize Respondent because the latter, motivated by purposes of generosity and in order to compenstate employees for losses of earnings during periods of curtailed production which result from the normally fluctuating character of Respondent's business (R. 52; 206), adopted in the autumn of 1938[4] an income sharings plan, which was designed to "supplement wages received from the fixed hourly rates" (R. 206, 167 F (2d), 696) and "to *add* to an *existing* wage structure of fixed hourly rate with time and a half for overtime, an additional incentive hourly premium rate" (District Court's findings, R. 58—italics supplied).

This is not a case where a bonus plan was devised as a substitute for the overtime standards of the Act, or as a means of evading or achieving painless compliance with the requirements of the Act. As the District Court found (R. 57, 58) Respondent's plan was "put into operation prior to the effective date of the Fair Labor Standards Act, not for the purpose of circumventing the Act or maintaining a status quo, but, in a realistic and mathematically workable manner, to *add to* an *existing* wage structure" (italics supplied). The plan by which this *addition* was made, the District Court further found, "is simple, and understandable, and divides the incentive wages into regular and overtime hourly segments in a realistic and mathematically workable manner" (R. 58). The Circuit Court

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[4] As noted both by the District Court (R. 51, 52) and the Circuit Court of Appeals (R. 205, 167 F (2d), 695), Respondent had over a period of years adopted voluntarily many plans for the economic benefit of its employees, including service awards, suggestion awards, Company-financed annuity and insurance programs, hospital and surgical benefit plans, co-operative bank savings plans, and other plans providing employee benefits.

of Appeals, concurred in these findings (R. 206, 167 F (2d), 696).

The plan operated as follows: (1) the company's total prospective sales income allocable to the month was computed by determining the total net sales price of all products entering the final inspection department during the month. (2) There would then be computed a certain percentage of the total sales income (the percentage varying at successive periods from 18% to 24%, but always bearing a close relation to the direct labor costs of production in preceding years—R. 206). (3) This stipulated percentage of the total sales income would then be compared with the total wages (straight time and overtime) previously paid to all employees participating in the plan. (4) If the total wages (including overtime) were less than the stipulated percentage of the total sales income, the difference constituted the bonus fund which was distributed to the employees as additional compensation. (5) This additional compensation was distributed as follows: the bonus fund was translated to a percentage figure, representing the proportion which the bonus fund bore to the total wages, including overtime (the percentage being obtained by dividing the bonus fund by the total actual labor costs, including both straight time and overtime); and each employee's total monthly straight time pay and overtime pay was increased by this percentage.[5]

For example, in the month of February, 1945, as shown by Exhibit 92 (R. 201) the computation was as follows: (1) The total prospective sales income was $372,946.86. (2) The stipulated percentage, 24% thereof, therefore equalled $89,507.25. (3) The total wages (both straight time and overtime) for the month were $78,024.88. (4)

[5] The details of the computation are well set forth in the opinion of the Circuit Court of Appeals, (R. 206, 167 F (2d), 696).

The total wages being $11,482.37 less than 24% of the sales income, this difference constituted the bonus fund. (5) Dividing $11,482.37 (the bonus fund) by $78,024.88 (total wages, straight time and overtime) produced a percentage figure of 14.7%; and accordingly, each employee's total monthly pay was increased by that percentage. If an employee had worked 160 straight time hours at 90c to earn $144 in straight time wages and had worked 30 overtime hours at $1.35 to earn $40.50 in overtime wages, he would receive a bonus of $27.12 (21.17 or 14.7% of $144 straight time pay plus $5.95 or 14.7% of $40.50 overtime pay).

Both Lower Courts held that Petitioner's "regular rate" comprised his hourly rate plus the percentage increment. If they were correct in so holding, there can be no question but that Petitioner was paid one and one-half times his "regular rate" of pay for each overtime hour. But Petitioner urges that the bonus percentage which was added to his *overtime* earnings must be allocated solely to straight time earnings, and his "regular rate" accordingly increased. It is Petitioner's position that although the employment contract specifically allocated one share of the bonus for each straight time hour worked and one and one-half shares of the bonus for each overtime hour worked,[6] and even though an employee participated in that part of the bonus fund contractually allocated to overtime compensation only if the employee had previously worked more than a specified number of hours during the workweek, nevertheless the entire bonus fund must be allocated exclusively to straight time compensation. This position was found untenable by the Circuit Court, which held "Ap-

[6] With the result that "the compensation paid to the employee contains some amount that represents an overtime premium."—*Bay Ridge Operating Co.* v. *Aaron*, —— U.S. ——, No. 366, October 1947 term, (slip opinion, p. 16).

pellants error consists in attempting to treat *all* of the production savings as being paid for regular non-overtime work, although the plan, by contract, provides otherwise" (R. 210).

INDEX

PAGE

OPINIONS BELOW I
JURISDICTION I
QUESTION INVOLVED II
STATEMENT OF THE CASE II
1. Petitioner's Contract of Employment III
2. Respondent's Income Sharing Plan VI
ARGUMENT 1
1. There Is Not Involved Any Important Question of Federal Law Which Should Be Settled 1
2. The Decision Below Is Not In Conflict With Applicable Decisions of this Court 5
CONCLUSION 11

TABLE OF CASES

PAGE

Bay Ridge Operating Co. Inc., v. Aaron, — U. S. —, (June 7, 1948), No. 366 October 1947 term ..... VIII, 8, 9, 10
Magnum Import Co. Inc., v. Coty, 262 U. S. 159 (1923) 5
McComb v. Utica Knitting Company (C. C. A. 2, 1947) 164 F (2d) 670 3
Walling v. Garlock Packing Company (C. C. A. 2, 1947) 159 F (2d) 44 3
Walling v. Halliburton Co., 331 U. S. 17, (1947) 7
Walling v. Harnischfeger Corp., 325 U. S. 427 (1945) ..... III, 6, 7
Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419 (1945) ..... III, 6, 7

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ARGUMENT

Petitioner suggests two grounds for the allowance of the writ: (1) that the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court; (2) that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. We reply to these two points *seriatim*.

1. There is Not Involved Any Important Question of Federal Law Which Should Be Settled.

There has never been any question (it having been so ruled by the Wage and Hour Division in a long series

of interpretative bulletins[7] and it being conceded, indeed, by Petitioner at page 19 of his petition) that where an employee is paid at an hourly rate, and thereafter a bonus is paid on the basis of a predetermined percentage of his total earnings (both straight time and overtime) exclusive of the bonus, there exists full compliance with the Act. The question which Petitioner seeks to interject into the case could not arise unless the employees were paid on a piece-rate basis. He assumes, throughout his petition, that Petitioner was so paid. But, as we have pointed out *supra,* the uncontradicted evidence makes it clear that Petitioner was not employed on a piece-rate basis. The findings of both Lower Courts, specifically rejecting this contention of Petitioner, rested on the testimony of employee witnesses that they were paid hourly rates (R. 84, 158, 162, 167), on the hiring cards (Ex. 66, R. 192), employment records (Ex. 6, R. 193), and payroll records (Ex. 66 R. 195) of the employer; on the fact that the productive efforts of the employees were not controlling in determining the amount of the bonus distribution (R. 56), and on other like conclusive evidence.

Petitioner's argument, though ingeniously contrived, is woven on a web of false premises. If the employees were

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[7] See Release R-1548 (a), dated September 2, 1941; stating that where a bonus is distributed in an amount which varies according to the "sales income" of the employer and where a bonus is paid at the rate of X percent of the employee's straight time earnings and X percent of his overtime earnings, the payments "satisfy in full the overtime provisions of the Act." To the same effect see Release A-13, dated February 5, 1945, and also the opinion letter of the Wage and Hour Division, dated August 16, 1946. These comprise the principal published statements of the Wage and Hour Division asserting that where a bonus is paid on the basis of a predetermined percentage of an employee's gross hourly earnings (including both straight time and overtime) the requirements of the Act have been satisfied. Specific advice to the same effect was given Appellee in a letter from the Regional Attorney of the Wage and Hour Division, dated December 13, 1941, Ex. 88 (R. 197) wherein the Wage and Hour Division advised Appellee that "upon the facts which you present in your inquiry" and "from a careful study of the problem set forth in your letter" it was the opinion of the Wage and Hour Division that Appellee's "method of pro-rating the production savings over your total payroll is in conformity with our interpretation of the requirement of the Act."

in fact hired on a group piece-rate basis—if the employment contract in fact were that the employees would be paid as straight time compensation 24% of the dollar value of the goods they produced—then a question might arise as to whether the parties could provide by agreement that a certain segment of the group piece-work earnings would be allocated exclusively to overtime compensation.

But the ready answer is that the contract of employment was not as Petitioner represents it. Both Lower Courts found that the terms of the employment contract were that Petitioner was paid an hourly rate. These concurrent findings as to the terms of the employment contract are indubitably findings of fact; and it is not appropriate that certiorari issue for the purpose of requiring this Court to redetermine from the evidence this factual question.

Even if it were supposed that certiorari might issue for the purpose of reviewing the hypothetical question which Petitioner presents—whether, *if* a contract of employment provided for the payment of piece rates, the parties could legally agree that a certain portion of the total earnings of the entire group of employees should be allocated to the purpose of paying extra compensation to those who worked overtime—still we submit that the allowance of the writ would be inappropriate because such hypothetical question is not an important one. Certainly, that question has no proper place in the disposition of this case. Nor has Petitioner made any showing that such question would be involved in any employment contract in effect anywhere. Indeed, Petitioner concedes (p. 20) that he knows of no case involving such a plan.[8]

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[8] However, it appears that in two cases—*Walling* v. *Garlock Packing Company* (C. C. A. 3, 1947) 159 F (2d) 44 and *McComb* v. *Utica Knitting Company* (C. C. A. 2, 1947) 164 F (2d) 670—a bonus paid in substantially the same method as that here involved was held or assumed to be in compliance with the law. The District Court's opinion in the latter case pointed out that no claim was made that any violation of the Act was involved in the payment of the bonus.

Decision in the lower Court herein was rested largely on the Court's finding (which limits the effect of the decision to the particular and somewhat unusual circumstances here involved) that the bonus was something added to a pre-existing bona fide hourly rate structure (R. 211). The Court did not lay down any broad principles of general application. Rather, its opinion reviewed carefully all the Supreme Court decisions cited by the Petitioner, pointing out the factual differences between the cases relied on by Petitioner and the instant case, and further pointing out that the holdings in a long line of Supreme Court cases necessitated, under the Court's findings as to the particular factual situation here involved, the conclusion that there had been no violation of the Act.

There is no basis at all for assuming that to leave the decision of the Circuit Court of Appeals in effect, without re-examination here, would lead other employers to adopt the same plan. The particular factual circumstances which the lower Courts here found to be controlling would in all probability not be duplicated in any other plant wherein a somewhat similar plan might be inaugurated. Further, we respectfully suggest that the Court need not concern itself with this fear, because if other employers did adopt similar plans, their employees would be the beneficiaries, for it is readily demonstrable that the plan here involved was far more liberal, and resulted in greater payments to employees, than obtain under most plans for the distribution of a share of an employer's income or profits among the employees. Certainly, the adoption of this plan by Respondent increased its total labor costs by far more than is required under the "time and a half for overtime" requirement of the Act.

2. The Decision Below is Not in Conflict With Applicable Decisions of this Court.

The petition repeats—for the most part in identical language—all of the arguments as to the merits of the case which were urged before the Circuit Court of Appeals. We think Petitioner overlooks the admonition of Chief Justice Taft, speaking for the Court in *Magnum Import Co. Inc.* v. *Coty*, 262 U. S. 159, 163 (1923), that "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." We do not conceive it appropriate to incorporate, in this memorandum opposing the application for certiorari, Respondent's answers to these various arguments, as they were set forth in Respondent's briefs below. We think that the opinion of the Circuit Court of Appeals amply answers all these arguments (and demonstrates that its decision is not in conflict with but is on the contrary entirely supported by prior decisions of this Court.

We do not undertake to reply in detail to Petitioner's argument on the merits. However, we think it appropriate to point out that his entire argument is based on the assumption that a violation of the Act can be premised on the method by which the amount of the bonus fund is determined. But this assumption is erroneous.

The Act does not lay down any mandate as to the method by which to determine the amount of the bonus fund, where, as here, the bonus is added to a *bona fide* hourly rate; The Act is concerned only with the method by which the bonus fund, once determined, is distributed. If the bonus be deemed a part of the "regular rate" of pay, then, under the Act, it must be so distributed that each employee reecives once and one half as much for

each overtime hour as for each straight time hour. But the method of determining the amount of the bonus fund is not affected by the Act. The employer may pay no bonus. If he chooses to pay one, he can determine the amount of the bonus fund by any method which strikes his fancy. The amount of the bonus fund could, with perfect legality, be determined by pure chance—on the basis of published bank clearings, United States Treasury balances, stock exchange sales, or some other method quite unrelated to the employer's operations. Or it could be based on production, or on profits, or on cost-of-living indices. As the Administrator has pointed out in published releases and interpretations, there are innumerable methods of arriving at a bonus fund; and with these, the Act is not concerned. It is only after the amount of the bonus fund is determined that the Act limits the employer's freedom of choice. It prescribes the method of distributing the bonus fund. But here, since one share of the bonus fund was paid for each straight time hour worked, and one-and-one-half shares for each overtime hour worked (with appropriate differentials for differences in hourly rates) it is conceded that the method of distributing the bonus fund was in compliance with the requirements of the Act. In the cases cited by Petitioner, *per contra,* the method of distribution did not meet this test.

Insisting throughout his application (despite the adverse findings of both lower Courts on this factual question, and despite the uncontradicted evidence in support of such findings) that he was employed on a piece-rate basis, Petitioner rests his argument almost entirely on the decisions in *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427 (1945) and *Walling* v. *Youngerman-Reynolds Hardwood Company,* 325 U. S. 419 (1945). These cases are referred to on nearly every page of his petition. The as-

serted conflict between the decision below and prior decisions of this Court rests entirely on the argument that those two cases are controlling here. We think, therefore, that to point out the vast differences between those cases and the case at bar effectively disposes of the argument that the decision below is in conflict with applicable decisions of this Court.

Adopting the language previously used by this Court (in *Walling* v. *Halliburton Co.*, 331 U. S. 17, 24-1947) to summarize its decisions in the *Harnischfeger* and *Youngerman-Reynolds* cases, the employment contracts in both those cases:

> "established two alternative methods for computing each employee's wages. One was to multiply his straight-time hours of work by a specified basic hourly rate, and his overtime hours by one and one-half that rate, and add the products. The other method was to multiply the number of jobs done by a specified piece-work rate. The employee was entitled to be paid the greater of these two sums."

But actually, on the facts of those two cases, as this Court pointed out, the piece work rates were determinative of the wage to be paid. In other words, those cases involved piece-rate workers; and did not involve any income-sharing bonus plan. The employees in those cases actually received only their straight time piece-work rates, without any additional compensation for overtime. They did not receive once and one-half as much compensation for each overtime hour as for each straight-time hour. In the instant case, on the other hand, the employees were not paid on piece rates, and they *did* receive once and one half as much compensation for each overtime hour as for each straight-time hour.

The opinion of the Circuit Court of Appeals discussed this distinction fully (167 F (2d) 697-699). It pointed out that the rulings in the Harnischfeger and Youngerman-Reynolds cases:

> "are based essentially upon the fact that the employee was *actually* compensated upon a piece rate basis and that the amount received by reason of the piece-rate basis during the regular workweek was the regular pay rather than the amount received by application of the hourly rate basis specified in the contract;" (R. 208-209)

and after pointing out that:

> "In the present case the employees were not piece-rate workers and were not employed on a piece-rate basis," (R. 209)

the Court below said that:

> "The contractual rates which were held invalid by the Supreme Court in the cases relied on by appellant were not established in a bona fide manner; they were held invalid because of their wholly unrealistic and artificial nature"; (R. 211).

and the Court below then pointed out that in the instant case:

> "The contract of employment contained a *bona fide hourly rate.*" (R. 211).

The correctness of the Circuit Court of Appeal's analysis of the rulings in the *Harnischfeger* and *Youngerman-Reynolds* cases is indicated by the fact that only a few weeks ago this Court in *Bay Ridge Operating Co., Inc.* v. *Aaron* (June 7, 1948, No. 366, October 1947 term, slip opinion, page 24) declared in footnote 29 that the statements made by the Court in those cases were

> "made as to a situation where this Court concluded the dual pay plan of the case was 'wholly unrealistic and artificial * * * so as to negate the statutory purposes.' "

Again, we recur to the same point previously made: in the instant case, the fundamental inquiry is a factual one: What was Petitioner's contract of employment? Was his contractually specified hourly rate a *bona fide* rate, or was it a mere artifice? These questions of fact are resolved adversely to Petitioner's contentions by the concurrent findings of both lower Courts. Their findings that the contractually specified hourly rate was *bona fide,* and not a mere artifice, rested on the lower Courts' appraisal of the somewhat unusual factual situation involved in this particular case, and particularly on the fact that the hourly rate structure had long been in effect before the bonus was introduced as an addition thereto. This serves to demonstrate that the hourly wage rates were in no sense an artifice. The concurrent findings of the lower Courts on this question should be accepted. If accepted, it disposes of the case.

Indeed, the whole question as to conflict between the decision below and applicable decisions of this Court may be laid at rest upon further examination of the holding of this Court in June, 1948, in the *Bay Ridge* case. In that case the Court declared (p. 16, slip opinion)

> "Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that reprerents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division."

In the instant case, it is undisputed that each employee received one share of the bonus fund for each straight time hour worked and one and a half shares of the bonus fund for eacth overtime hour worked. Those shares of the bonus fund allocated by the employment contract to payment of overtime premiums went only to those employees who had worked in excess of 40 hours during the workweek. They were clearly "true overtime premiums", within the test laid down by this Court in that case, defining true overtime premiums as "extra pay for work because of previous work for a specified number of hours in the workweek." (Slip opinion, p. 2).

Therefore, the overtime shares of the bonus fund, received by those employees who worked overtime (and only by those employees) must be deducted from each employee's total weekly compensation before computing his statutory "regular rate." That is exactly what Respondent did, and what the Court below held proper. Petitioner insists that these overtime shares of the bonus fund must be allocated exclusively to his straight time earnings, and made a part of the base on which his statutory "regular rate" is to be computed. But in the *Bay Ridge* case, this Court held that this must be done, declaring (slip opinion, pp. 17, 18):

> "When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended.

* * *

"Otherwise the purpose of the statute to require payment to an employee for excess hours is expanded extravagantly by computing regular rate of pay upon a payment already made for the same purpose for which § 7 (a) requires extra pay, to wit, extra pay because of excess working hours. Accordingly, statutory excess compensation paid for work in excess of forty hours should not be used to figure the regular rate. Neither should similar contract excess compensation for work because of prior work be used in such a calculation. Extra pay by contract because of longer hours than the standard fixed by the contract for the day or week has the same purpose as statutory excess compensation and must likewise be excluded."

The decision in the Court below is entirely consistent with, and would seem to be required by, the pronouncement of this Court in the *Bay Ridge* case.

CONCLUSION

This case involves primarily a question of fact: what were the terms of Petitioner's contract of employment?

The petition is based upon a complete disregard of the concurrent findings of both lower Courts on this factual question. It asks this Court to reverse these findings of fact, to ascertain that Petitioner was employed on a piece-rate basis, and then decide a question which is not actually involved in this case.

It is therefore urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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August 17, 1948.